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OCT 23 2017

Nos. 16-476 & 16-477

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, ET AL.,
Petitioners,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

NEW JERSEY THOROUGHBRED
HORSEMEN'S ASSOCIATION, INC.,
Petitioner,
v.
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Is it constitutional for the Professional and Amateur Sports Protection Act to restrain the expansion of gambling in a manner consistent with *The Federalist No. 10*?

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1981 by Phyllis Schlafly, *Amicus Curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") has long opposed gambling. Phyllis

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. All the parties have filed blanket consents with the Court for the filing of this and other amicus briefs.

Schlafly supported a ban on lotteries and commercialized gambling. She supported enforcing a ban in all areas subject to federal jurisdiction, such as interstate commerce – which includes the internet and the banking system. She wrote multiple columns against gambling while exposing the real harm that it causes.

Eagle Forum ELDF has a direct and vital interest in this case to defend against the harm caused by the requested expansion in sports gambling.

SUMMARY OF ARGUMENT

The Professional and Amateur Sports Protection Act ("PASPA") fulfills James Madison's justification for the Constitution in *The Federalist No. 10*: protection by a broader republican government of individual states against harm by powerful factions. It is valid under the Constitution to epitomize what Madison promised as the primary reason for ratifying it. Pro-gambling interests are the kind of faction Madison feared, and he was right in predicting that individual states, even though republican in structure, cannot alone withstand such factions. A broader republican national government is needed to defeat the faction, and PASPA delivered just as Madison hoped.

One can hardly pretend that Madison's brilliant vision in *The Federalist No. 10* is somehow unconstitutional to realize. PASPA should be marveled at, not declared unconstitutional based on a distortion of the doctrine of "anti-commandeering." In PASPA, Congress chose a relatively non-intrusive means of combatting the spread of gambling, and

Congress took an approach that should be praised and emulated. Congress could have banned sports gambling outright, or banned all new forms of sports gambling, but instead allowed some flexibility in dealing with this vice. PASPA is an artful – and fully constitutional – way to achieve the Madisonian goal of defeating factions through use of a national republican government.

Far from infringing on the Tenth Amendment, PASPA adhered to it. But in a breathtaking elevation of form over substance, Petitioners and their *amici* try to gin up a state sovereignty issue where none exists. On behalf of the American people Congress has spoken, with overwhelming majorities, against expansions in wagering on sports. By so doing, Congress saved New Jersey from the pro-gambling faction, and saved the integrity of competitive sports – both professional and amateur – from the corrosive effects of addictive gambling.

If there are to be more restrictions on incursions by Congress into state sovereignty, this case is not the vehicle to establish such limits. No one can plausibly assert that gambling on national sports competitions is within the traditional domain of state authority, or that the federal government lacks power to regulate this inherently interstate activity. Many of the *amici* siding with Petitioners, such as the State *Amici*, are quick to deny that they even support legalizing sports gambling. An activity widely recognized as harmful, having no claim to being within the exclusive domain of state authority, is not a proper candidate for breathing some life into the Tenth Amendment.

Gambling has long been recognized as a vice prohibited by many state constitutions. Indeed,

among all addictions, gambling is correlated with the highest rate of suicide.[2] Gambling harms blacks, Hispanic, and Native American youths at twice the rate of whites.[3] Gambling harms poor people more than the rich, and exploits the uneducated more than the educated, resulting in greater economic inequality. Unlike other vices, gambling has no redeeming benefit for anyone. In extreme cases, gambling results in tragedies like the recent mass murder in Las Vegas by Stephen Paddock, the gambling addict who murdered 58 and then himself, while injuring more than 500 others. For most of American history, gambling has been properly outlawed, for very good reasons, and the Tenth Amendment does not exist for the federal judiciary to side with factions to inflict such money-making vices on the American people.

This case epitomizes the flaws in the legal philosophy of "law without values," where clear-cut values at stake are supplanted by sterile – and easily manipulatable – legal formalisms. An Act of Congress advanced the public good by limiting the expansion of the vice of gambling into national professional and amateur sports. The PASPA embodies the salutary principle set forth in *The Federalist No. 10*, where James Madison explained how our large republic exists for the very purpose of helping to prevent vices, like gambling, from being inflicted by factions in individual states.

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[2] http://www.knoxnews.com/story/life/2017/10/06/gambling-addiction-psychological-root-las-vegas-killings/739059001/ (viewed 10/12/17).

[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2737691/ (viewed 10/9/17).

ARGUMENT

I. PASPA EXEMPLIFIES THE MADISONIAN VISION IN *FEDERALIST NO. 10*, AND IS THEREBY CONSTITUTIONAL.

Perhaps the single greatest value of the Constitution, James Madison taught in *The Federalist No. 10*, is in authorizing a broader republican government to defeat factions that individual states alone cannot withstand:

> Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

The Federalist No. 10 (J. Madison).[4]

By "faction", Madison meant precisely the sort of "special interest" of legalizing gambling on sports as presented in this case, which PASPA successfully restrains. Madison explained, with examples, what he meant by "faction":

> A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it ....

Id. A "rage" for sports gambling fits perfectly within Madison's list of examples of "improper or wicked project[s]," and individual states like New Jersey are unable to restrain the faction, even with a republican form of government. Madison predicted this, and

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[4] http://www.constitution.org/fed/federa10.htm (viewed 10/22/17).

urged the ratification of the Constitution so that a broader republican government – to wit, Congress – would be strong and diverse enough to put down the faction that individual states could not withstand.

The Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701, *et seq.*, exemplifies Madison's vision. Enacted 25 years ago, PASPA succeeded as a super-majority of congressmen and senators stood against an expansion in the wagering on sports. PASPA established that "[i]t shall be unlawful for ... a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" a sports wagering scheme. 28 U.S.C. § 3702(1). PASPA perfectly achieves Madison's dream that the national government combat and defeat factions that would inevitably arise and overwhelm individual states.

Many Supreme Court Justices have embraced this principle of Madison as set forth in this most famous of all *The Federalist* essays. Justice Scalia, for example, described Madison's vision as "prophesy" while concurring with an invalidation of a city's set-aside program. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 524, 109 S. Ct. 706, 738 (1989) (Scalia, J., concurring). *See also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting) ("This principle of generality is well rooted in our broader understandings of the Constitution as designed in part to control the "mischiefs of faction.") (quoting *The Federalist No. 10*).

As Madison explained further in his landmark essay:

> [T]he same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, – is enjoyed by the Union over the States composing it.

The Federalist No. 10 (J. Madison).

One can hardly insist that the Tenth Amendment, which Madison helped draft, should be used to obstruct Madison's fundamental justification for the Constitution itself. Instead, Petitioners and their *amici* stand completely against Madison on his reasoning for creating a national republican government. Nothing in the arguments of Petitioners and their *amici* can be reconciled with Madison's understanding of why the national government should exist, and how it should combat factions.

Petitioners and many of their *amici* quote Madison, but not for his support of using the national government to defeat the harmful influence of factions in individual states, as PASPA so effectively does. Recognizing Madison as the authority he is, Petitioners, their State *Amici*, and additional supporting briefs rely heavily on Madison without ever mentioning his overriding concern of the pernicious effect on government of factions, which the pro-gambling forces obviously are.

PASPA does not "compel the States to enact or administer a federal regulatory program," as prohibited by this Court in *New York v. United States*, 505 U.S. 144, 188 (1992). Nor does PASPA relegate states to be "mere political subdivisions of the United States." *Id.* at 188. Rather, PASPA properly combats the pro-gambling faction while respecting the "'residuary and inviolable sovereignty'" of the states as

embodied in the Tenth Amendment. *Id.* (quoting *The Federalist No. 39*, p. 245 (C. Rossiter ed. 1961)). Nothing in PASPA "force[s] participation of the State's executive in the actual administration of a federal program." *Prinz v. United States*, 521 U.S. 898, 918 (1997).

PASPA does not "commandeer" any state legislature under any reasonable meaning of that term. Rather, PASPA merely ensures that expansion into sports gambling will not occur, and PASPA accomplishes that worthy goal in a laudatory manner. PASPA is as respectful of the states as possible while limiting the expansion of gambling.

James Madison could have written PASPA himself to combat the pro-gambling or similar faction. Indeed, it is difficult to imagine a finer fulfillment of Madison's justification for the national government to combat factionalism than this law. Simply put, PASPA exemplifies Madison's vision in *The Federalist No. 10* and in no way violates the Tenth Amendment.

II. MISUSING THE TENTH AMENDMENT TO UNLEASH SPORTS GAMBLING ILLUSTRATES THE BANKRUPTCY OF "LAW WITHOUT VALUES."

The "law without values" approach to jurisprudence has a superficial appeal, and over the years has been championed by individual justices such as Oliver Wendell Holmes, Jr. Yet this case illustrates how wrong that approach can be, as Petitioners urge a result that could unleash the vice of sports gambling on our Nation. Deciding cases such as this by ignoring the underlying values at stake is a judicial philosophy

that leads to moral bankruptcy, which should be rejected.

Gambling is plainly a harmful, destructive activity, and any opinions by this Court now should recognize as much. In 1905, this Court had no difficulty observing as follows:

> For a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare.

Marvin v. Trout, 199 U.S. 212, 224 (1905).

In addition, many state constitutions from New York[5] to Washington[6] have restricted gambling, and at least one state constitution expressly described gambling as that "vice" that it is:

> "Gambling is a *vice* and the Legislature *shall* pass laws to *suppress* it." This declaration coupled with a mandate is a part of our fundamental law, Section 8, Article 19 of the Louisiana Constitution of 1921, just as it was contained in previous Constitutions of this state.

Gandolfo v. La. State Racing Com., 227 La. 45, 72-73, 78 So. 2d 504, 514 (1954) (Hamiter, J., dissenting, emphasis in original). *See also Primm v. Reno*, 70 Nev. 7, 12, 252 P.2d 835, 837 (1953) (the "business of gambling ... is capable of being so conducted as to be ***a source of evil***") (emphasis added). This Court should likewise recognize the values at issue here.

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[5] N.Y. CONST. Art I, § 9.

[6] WASH. CONST. Art II, § 24.

As Phyllis Schlafly observed in 2014, "For those who promote legalized gambling as a means of economic development or revitalization, or as a painless way to pay for public schools, the recent news from Atlantic City, New Jersey, is sobering." Phyllis Schlafly, "Where's the Payoff in Gambling?" (Sept. 9, 2014).[7] She explained that "New Jersey voters succumbed to a slick campaign that promised to remake the fading resort [of Atlantic City] into Las Vegas East," with the ultimate result a massive unemployment rate and a towering 57-story casino hotel worth only a fraction of what it cost to build with taxpayer funds. *Id.* The Atlantic City failure story is by no means unique; Phyllis Schlafly's hometown of Alton, Illinois, was likewise crippled by riverboat gambling there. *See id.*

New Jersey voters learned from their prior mistakes. Amid all the talk of "state sovereignty" in briefs filed in support of sports gambling in this case, in fact New Jersey voters subsequently rejected an expansion in gambling the most recent time it was on the ballot. By a record-breaking landslide vote of 78-22%, a referendum in 2016 to expand gambling to northern New Jersey lost by the biggest margin of any referendum in the history of the State.[8] This result occurred despite how more than $24 million was spent on the referendum, by far the most ever on such a ballot initiative in this state.

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[7] https://www.creators.com/read/phyllis-schlafly/09/14/wheres-the-payoff-in-gambling (viewed 10/10/2017)

[8] http://www.nj.com/politics/index.ssf/2016/11/nj_voters_reject_north_jersey_casino_proposal_by_a.html (viewed 10/10/2017)

Yet under a "law without values" approach, none of the above would matter. Despite having an unrivaled talent for the law, Justice Holmes lost the influence he should have attained, because he went down the wrong road of "law without values" as explained in a biography of him by Professor Alschuler. *See* Albert W. Alschuler, "Law Without Values: The Life, Work, and Legacy of Justice Holmes" (2000). Ignoring the values at issue in a case is a recipe for reaching an incorrect result. Deciding this or any case without some recognition of the underlying values, which are compelling here against expanding gambling, would constitute an unwanted triumph of form over substance. Justice Holmes's philosophy led him to rule in favor of forced sterilization of a defenseless woman because he interpreted the state law as allowing it and he ignored compelling values that would have stopped it. *Buck v. Bell*, 274 U.S. 200 (1927).

No legal philosophy worth its salt would fail to recognize the underlying values. Congress properly enacted PASPA to combat a vice.

III. *CERTIORARI* SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

Attempts to convert this case into some kind of historic precedent about federalism, the Tenth Amendment, state sovereignty, or even a landmark to allow states to legalize marijuana, are entirely misplaced. This is not a case about state sovereignty, but is an attempt by the pro-gambling faction to expand its profits at the disproportionate expense of minority youths, the poor, and the less educated.

Any precedent set by this Court on these unique facts will distort the broader anti-commandeering

principles. Far from clarifying this field of law, a ruling in this case could both harm the public by opening the floodgates to sports gambling, and distort the law in other areas where Congress has also acted properly to limit a vice related to an activity that is inherently interstate. "Bad facts make bad law" is an aphorism that applies here, and this Court should decline the opportunity to make "bad law" in a misplaced quest to try to bolster state sovereignty.

The Acting Solicitor General urged this Court not to grant *certiorari* in this case, which involves an unusual fact pattern and substantial confusion about the effect of a decision here. The Acting Solicitor General was right. The petitions for *certiorari* should be dismissed for having been improvidently granted.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed or the petitions for *certiorari* should be dismissed for having been improvidently granted.

Dated: October 23, 2017

Respectfully submitted,

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